IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

CWP No.12985 of 2002
Date of decision: 19.10.2007

State of Haryana.

-----Petitioner

Vs.

Prem Singh and another.

-----Respondents

CORAM:- HON'BLE MR JUSTICE ADARSH KUMAR GOEL
HON'BLE MR JUSTICE AJAI LAMBA

Present: Mr. Jitendra Chauhan, Addl. A.G., Haryana.
for the petitioner.

ADARSH KUMAR GOEL, J.

This petition seeks quashing of award dated 24.5.2001, Annexure P-5.

Claim of the respondent No.1-workman was that he was appointed as Conductor on 13.5.1974. He was given a charge sheet dated 11.5.1992, alleging embezzlement of Rs.42/-. On that account, he was terminated from the service on 22.5.1993 and his appeal was dismissed on 11.4.1996. He raised an industrial dispute by way of a demand notice dated 8.10.1997, on the ground that he was not given adequate opportunity of being heard before passing of order of

termination.

The petitioner-management contested the claim by submitting that fair inquiry was held and order of termination was justified.

The Labour Court held that the inquiry was not fair and no new evidence was led by the management before the Labour Court. The workman was held to be entitled to reinstatement with continuity of service.

At the time of admission of the writ petition, stay was granted only qua recovery of backwages. The workman was accordingly allowed to join service. It is stated by learned counsel for the State that the workman has since retired.

In view of above development, we need not examine the question whether the finding of the Labour Court that the inquiry was not fair or that the workman was entitled to reinstatement, was justified or not. The workman had already rendered 19 years of service prior to termination of his services.

Only question for consideration is whether the award of backwages was sustainable?

The law in this regard has undergone a significant change. Even if termination is held to be illegal, award of backwages does not automatically follows. A pragmatic view is required to be taken, having regard to the fact that the employer may not be required to pay for the period when the workman did

not contribute anything. The workman is also required to prove that he was not gainfully employed. We may refer to a recent judgment of the Hon'ble Supreme Court in ***J.K. Synthetics Ltd.*** ***v. K.P. Agrawal*****,(2007) 2 SCC 433**, wherein it was held:-

> **15.** But the manner in which "back wages" is viewed, has undergone a significant change in the last two decades. They are no longer considered to be an automatic or natural consequence of reinstatement. We may refer to the latest of a series of decisions on this question. In *U.P. State Brassware Corpn. Ltd.* v. *Uday Narain Pandey, (2006) 1 SCC 479*, this Court following *Allahabad Jal Sansthan* v. *Daya Shankar Rai, (2005) 5 SCC 124* and *Kendriya Vidyalaya Sangathan* v. *S.C. Sharma, (2005) 2 SCC 363* held as follows: (*Uday Narain Pandey case* (supra) , SCC p. 480 *d - g*)
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> > "A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an Industrial Court shall lose much of their significance.
> > Although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result, but now, with the passage of time, a pragmatic view of the matter is being taken by the court realising that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched. The changes brought about by the subsequent decisions of the Supreme Court, probably having regard to the changes in the policy decisions of the Government in the wake of prevailing market economy, globalisation, privatisation and outsourcing, is evident.
> > No precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it depends upon the facts and circumstances of

each case. It would, however, not be correct to contend that it is automatic. It should not be granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of the provisions of Section 6-N of the U.P. Industrial Disputes Act. While granting relief, application of mind on the part of the Industrial Court is imperative. Payment of full back wages cannot be the natural consequence."

In *G.M., Haryana Roadways* v. *Rudhan Singh, (2005) 5 SCC 591,* this Court observed:

" *8* . There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment

> though it may be for 240 days in a calendar year."

16. There has also been a noticeable shift in placing the burden of proof in regard to back wages. In *Kendriya Vidyalaya Sangathan (supra),* this Court held:

> "When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard."

In *U.P. State Brassware Corpn. Ltd.* (supra), this Court observed:

> " *61* . It is not in dispute that the respondent did not raise any plea in his written statement that he was not gainfully employed during the said period. It is now well settled by various decisions of this Court that although earlier this Court insisted that it was for the employer to raise the aforementioned plea but having regard to the provisions of Section 106 of the Evidence Act or the provisions analogous thereto, such a plea should be raised by the workman."

17. There is also a misconception that whenever reinstatement is directed, "continuity of service" and "consequential benefits" should follow, as a matter of course. The disastrous effect of granting several promotions as a "consequential benefit" to a person who has not worked for 10 to 15 years and who does not have the benefit of necessary experience for discharging the higher duties and functions of promotional posts, is seldom visualised while granting consequential benefits automatically. Whenever courts or tribunals direct reinstatement, they should apply their judicial mind to the facts and circumstances to decide whether "continuity of service" and/or "consequential benefits" should also be directed. We may in this behalf refer to the decisions of this Court in *A.P. SRTC* v. *S. Narsagoud* (2003)2 SCC 212, *A.P.*

SRTC v. *Abdul Kareem* (2005) 6 SCC 36 and *Rajasthan SRTC* v. *Shyam Bihari Lal Gupta* (2005) 7 SCC 406.

Accordingly, this petition is allowed and the award of backwages is set aside.

(Adarsh Kumar Goel)

Judge

October 19, 2007 **(Ajai Lamba)**

ashwani **Judge**